

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1499 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HARILAL P SHAH

Versus

ARVINDBHAI RATIBHAI PUNATAR

Appearance:

MR JR NANAVATI for Petitioner
MR KB ANANDJIWALA for Respondent No. 1
SERVED for Respondent No. 2
MR SURESH M SHAH for Respondent No. 5
PUBLIC PROSECUTOR for Respondent No. 6

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 03/02/97

ORAL JUDGEMENT

1. By way of this application under section 482 of the Code of Criminal Procedure, the petitioner seeks to quash the proceedings of the Cr.R. No. 131 of 1988 registered as Criminal Case No.1222/92 in the Court of Chief Judicial Magistrate, Jamnagar.

2. One Mr Arvind Ratibhai submitted a private complaint in the Court of the Judicial Magistrate First Class, Jamnagar on 14/8/1996. The learned Magistrate directed the police to investigate the matter u/s 156(3) of the Code of Criminal Procedure. The police registered the case as M.Case No. 106/86. the police, after investigation, prayed for "C" summary which was granted by the order of the learned Magistrate dated 5th December, 1988. I am informed that the said order has been confirmed by the Sessions Judge in a recent order passed in Criminal Revision No.18/1989.

3. It appears that, before the "C" summary was accepted, the complainant Arvindbhai Ratibhai submitted an application dated 31st April, 1988 to the District Police Officer, Jamnagar for taking action against the persons mentioned therein, for the offence of trespass and theft. It is stated in the said application that the applicant has house of his ownership viz. "Hem Nivas". He had filed an application in Jamnagar Court being Criminal Case No. 46/86 and M. Case No. 106/86 for offences punishable under section 406, 420 and 418 - IPC. It is alleged that the opponents entered in the house of his ownership and possession and have committed theft of moveable property. It is also stated that, after filing the complaint, he has come to know that the theft has been committed of his articles, which includes an iron cupboard.

4. It appears that the police proceeded with the investigation on the basis of the said report as Criminal Case No.131/88. After investigation, the police prayed for "C" summary which was been rejected by the impugned order of the learned Magistrate dated 15/4/1991, and issued the process against the accused applicants for offence u/s 380, 406, 421, 426 and 114 - IPC.

5. I have read the original complaint being Criminal Case No.42/86 (M.Case No.106/86) dated 14/8/1986 and the application dated 13/4/1988 in Criminal Case No.46/1986 (M. Case No. 106/86), subsequently registered as criminal Case No.131/86. The later application is nothing but an application in a matter pending investigation and as such, no separate case was required to be registered and investigated. Even if separate case was registered, it ought to have been clubbed with the original complaint, regarding which investigation was in progress. Once the "C" summary on the basis of the complaint dated 14/8/86 was accepted, there was no occasion for giving a separate "C" summary on the basis

of the application dated 13/4/1988. The learned Magistrate has overlooked this important aspect of the case, inspite of the fact that his attention was invited to the same and he has also given details in that regard in his order. Therefore, the order of the learned Magistrate dated 15/4/1991 issuing the process on the basis of "C" summary in Criminal Case No.131/88 deserves to be quashed, more particularly when the order of granting "C" summary has also been upheld by the learned Sessions Judge. Still, in view of the controversy involved, it will be appropriate to look into the matter.

7. The facts as culled out from the complaint and other materials on record are that, there is a building in the city of Jamnagar known as "Hem Nivas". That property is an ancestral property of two brothers viz. Ratilal and Chhotelal. Chhotelal's son Ramesh is accused No.1 and Manjula, a widow and daughter-in-law of Chhotelal is accused No.2. Accused No.3 and 4 are the daughters of Manjulaben. Accused No.5 - Ms Kusumben is the daughter of Chhotelal. The complainant Arvindbhai is the son of Ratibhai. Accused No.6 Harilal is said to be an advocate by profession. It is said that he is in possession of first and second floor of the building as mortgagee. Accused No.7 is the son of Harilal. It is alleged that he has been inducted as the tenant in the premises on the ground floor.

8. It appears that the complainant's father was in distress at one time, as there was a huge dues of the Income-Tax Department against him. The share of Ratilal in the building was put to auction which was purchased by Motiba, mother of Ratilal and Chhotelal. Motiba was in need of money for purchasing the share of Ratilal and therefore, she mortgaged first and second storeys of the house to Haribhai. The present dispute appears to be with respect to a portion of the building on the ground floor. Certain documents alleged to have been executed in favour of the accused No.6 and 7, on the basis of which, the possession has been transferred to them. Two civil suits are also pending in that regard. The complainant has made allegations against co-parceners i.e. accused No.1 to 5. Rights between co-parceners can be decided only in a suit and not criminal proceedings. It is not in dispute that two suits are already pending in the Civil Courts involving the same controversy. Reading of the impugned order shows that the learned Magistrate was much obsessed of the fact that accused Hari Ram, being a lawyer, even after the expiry of period

of mortgage has not returned the possession. The learned Magistrate failed to consider in such case the remedy with mortgager is filing a suit for redemption of mortgage, and not to press in criminal proceedings in such cases. In my view, continuance of criminal proceedings in such case is nothing but abuse of process of the criminal Courts. The learned Magistrate was clearly in error in rejecting the "C" summary and issuing process against the petitioner.

9. In view of the aforesaid, this Criminal Misc. Application is allowed. The impugned order dated 15/4/1991 passed by the learned Chief Judicial Magistrate, Jamnagar is quashed and set aside. Rule made absolute.

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